89-583

NO. 89-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLARENCE J. WILSON, ET AL,
Petitioners

v.

ARMSTRONG WORLD INDUSTRIES, INC., ET AL,
Respondents

On Writ of Certiorari From The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Do allegations and proof of a widespread conspiracy involving hundreds of lawsuits to suppress evidence, destroy documents, and commit perjury state a claim for "fraud of the court" under the savings provision of Rule 60(b)?

2. Should a proceeding alleging "fraud on the court" be treated procedurally as an "independent action" rather than as a mere motion for purposes of judgment on the pleadings, summary judgment, etc.?

LIST OF ALL PARTIES

PLAINTIFFS-PETITIONERS:

Belinge, Robert G.
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Brannen, Lloyd B.
Brown, B. C.
Campbell, John W.
Cash, Russell F.
Childers, Robert R.
Childers, Leslie B.
Cimerhanzel, Edwin E.
Copeland, John W.
Crosby, Marshall
Daigle, Ralph
Davis, Gilbert P.
Easley, Tommie L.
Greene, Billy
Grein, Edward
Grein, Johnny (Sr.)
Grein, Leo V.
Grein, Marvin
Grimes, Wilford
Harrison, James C.
Hartwell, Earnest
Howard, William (Sr.)
Jones, William C.
Kramer, Charles
Massey, Michael
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Moeller, Carl
Murphree, Tommy L.
Naquin, Luke
Oldham, Louis
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Pennington, Leemon
Ross, Joel B.
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Sanford, Alton B.

Shrader, Jesse
Steed, Jeff
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Thompson, Harvey Lee
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STANDARD INSULATIONS, INC.
c/o

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Plaintiffs-Appellants believe that most if not all casualty and indemnity companies in the United States will be affected by the outcome of this proceeding.

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IN THE

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OCTOBER TERM, 1989

CLARENCE J. WILSON, ET AL,
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v.

ARMSTRONG WORLD INDUSTRIES, INC., ET AL,
Respondents

On Writ of Certiorari From The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court:

Clarence J. Wilson, et al, seek a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit:

REFERENCES TO REPORTS OF OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 873 F.2d 869. The opinion of the district court is unreported.

GROUNDS OF JURISDICTION

The judgment sought to be reviewed is dated May 30, 1989 and was entered the same day. Petitioners' Motion for Rehearing was overruled on July 11, 1989. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Fed. R. Civ. P. 60(b) provides:

> (b.) Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 69(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the

finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

The original litigation involved fifty plaintiffs who suffered asbestos-related injuries. Jurisdiction was based on diversity of citizenship. The district court consolidated all fifty cases then ordered separate trials on the issues of liability and damages. The jury found that the hazards presented by asbestos to insulators and construction tradesmen were not known and could not have been known to these defendants prior to August 1, 1966. As a result, three of the defendants, Celotex, Pittsburgh-Corning, and Raymark Industries were potentially liable. The remaining six defendants (the Respondents here) were absolved of liability. The district court found no just reason for delay and entered final judgment in favor of these six defendants. *See* 107 F.R.D. 250. The Court of Appeals for the Fifth Circuit affirmed. 810 F.2d 1358. This Court denied certiorari. 108 S. Ct. 97.

Petitioners then filed a proceeding to set aside the judgment under Rule 60(b).[1] Petitioners alleged that the original judgment had been obtained through a "scheme to defraud . . . accomplished through the use of misrepresentations, concealment, fraud, and the intentional sponsoring of perjurous testimony." (Application for Permission to File a Rule 60(b) Motion to Set Aside Final Judgments, Appendix 1 (to that Motion) at 6-7.) The pleading went on to allege that a conspiracy involving numerous parties and their insurers had formed in the mid-1970s to defeat asbestos-related claims by "affirmatively misrepresent[ing] the truth of the 'state of the art.'" (*Id.* at 8.) The overt acts of this conspiracy included: (a) "preparing and presenting false and misleading factual evidence" to Courts and juries in hundreds of asbestos-related cases, (c) employing "lawyers and others to destroy, secrete, or misrepresent damaging evidence;" and (f) organizing "a consortium of a number of lawyers in a number of states" to present the fraudulent evidence. (*Id.* at 14.) Petitioners sought relief for "deliberate fraud upon the Court . . . as contemplated by Rule 60(b)(6)."

Petitioners presented numerous exhibits to the district court which tended to prove their allegations. The exhibits showed, among other particulars too lengthy to state in detail here, that thousands of relevant documents had been deliberately destroyed. (PX-B, 40-41), that reports dating from as early as the 1940's which connected asbestos to cancer had been uniformly suppressed

1. In accordance with earlier circuit precedent, this proceeding was originally filed in the Court of Appeals. *See, Bros, Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594 (5th Cir. 1963). The Court of Appeals then transferred the proceeding to the district court.

in the face of numerous production orders in numerous lawsuits (PX-23), and that many of the defendants had uniformly lied in numerous lawsuits about the extent and length of time of their involvement with asbestos. (PX-S-15; PX-K).

Based on the pleadings and the exhibits, without permitting any evidentiary hearing, the district court denied petitioners any relief. Appendix C at 4. The district court first ruled that, if the proceeding was based on Rule 60(b)(3), it was untimely. Appendix C at 3. The district court then rejected petitioners' "fraud on the court" contention by holding that defendants' conduct "in no way rises to the level of fraud or misrepresentation contemplated by Rule 60(b)." Appendix C at 4.

Petitioners then appealed to the Fifth Circuit. That court held that, to the extent petitioners' allegations fell within Rule 60(b)(3), they were time-barred. Appendix A at 5. Next, the court ruled that Rule 60(b)(6) could not be used to raise contentions which could have been raised under Rule 60(b)(3). Appendix A at 5-6. Finally, the court ruled that petitioners' "allegations do not rise to the level of 'fraud on the court' necessary to obtain relief under the savings clause of Rule 60(b)." Appendix A at 7. Instead, the court ruled that "fraud on the court" requires "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Appendix A at 6. This concept, according to the court, should "embrace only the species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases. . . ." *Id.* As a result,

the court found that "the district court did not abuse its discretion" and affirmed. Appendix A at 7. Petitioners' Motion for Rehearing was denied without opinion. Appendix B.

REASONS FOR GRANTING THE WRIT

ISSUE 1:

Do allegations and proof of a widespread conspiracy involving hundreds of lawsuits suppress evidence, destroy documents, and commit perjury state a claim for "fraud of the court" under the savings provision of Rule 60(b)?

The main portion of Rule 60(b) empowers the district court to set aside its judgment for "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentations, or other misconduct of an adverse party." Rule 60(b)(3). However, the viability of this provision for setting aside a judgment procured by fraud is seriously impaired by the requirement that the motion be made "not more than one year after the judgment, order, or proceeding was entered or taken." The lower courts have uniformly held that the one year time limit is absolute. *Carr v. District of Columbia,* 543 F.2d 917 (D.C. Cir. 1976); *Federal Deposit Ins. Co. v. Alker,* 30 F.R.D. 527 (E.D. Pa. 1962), *aff'd,* 316 F.2d 236 (3rd Cir.), *cert. denied,* 375 U.S. 880 (1963). Thus, a litigant who has been deceived cannot take advantage of the "discovery rule" which applies to cases of fraud in most jurisdictions and which delays the beginning of the applicable time limit until the litigant does or should have discovered the deception. *See e.g., Exploration Co. v. United States,* 247 U.S. 435, 446-448, 38 S. Ct. 571, 62 L.Ed. 1200 (1918); 37 Am. Jur. 2d, *Fraud and Deceit* § 405 (1968).

Thus, many litigants who believe a judgment was obtained against them by fraud or deception are relegated to the savings provision of Rule 60(b): "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud on the court." Unfortunately, it is far from clear what is needed to constitute "fraud on the court" and what essential element differentiates "fraud on the court" from the ordinary fraud to which the one-year time limit applies. Thus, many of the lower courts have found themselves in agreement with Judge Friendly's remark that: "The meaning of the quoted phrase [fraud on the court] has not been much elucidated by decisions." *Kupferman v. Consolidated Research & Manufacturing Co.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *See also Great Coastal Express, Inc. v. International Brotherhood*, 675 F.2d 1349, 1356 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983) ("The federal courts that have struggled with the definition of 'fraud on the court' in the context of Rule 60(b) have found such a definition elusive."); *Kerwit Med. Products v. N&H Instruments*, 616 F.2d 833, 837 (5th Cir. 1980); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973) ("The term 'fraud on the court' is a nebulous concept.").

The only guidance yet provided by this Court concerning the meaning of the term "fraud on the court" is *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed. 1250 (1944), a case which actually pre-dates Rule 60(b). There, Hartford procured the publication of a spurious trade journal article, supposedly written by a disinterested expert, which was

first used to persuade the Patent Office to issue a patent and later used to persuade the Third Circuit to find the patent valid and infringed.

Twelve years later, after the true nature of the article had been revealed, this Court was faced with the question of whether the judgment could be reopened. This Court first recognized that the rule of finality of judgments is not absolute. Instead, courts have "universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule." 322 U.S. at 244. This Court then held that the "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals" required that the earlier judgment be set aside. *Id.* at 245-246. However, this Court provided little guideline for determining what species of fraud must be shown to set aside a judgment other than the general statement that enforcement of the judgment must be "manifestly unconscionable." *Id.* at 244-245.

In the absence of recent guidance from this Court, lower court authority can be found to support a wide variety of theories of what constitutes "fraud on the court." Note, for example, the divergence of opinion between the majority and the dissent in *Great Coastal Express, Inc. v. International Brotherhood, supra.* The facts of that case presented a compelling case for relief from prior judgment. In 1970 the International Brotherhood (IBT) brought a strike against Great Coastal. Great Coastal then sued IBT on two theories: (1) damages caused by union violence; and (2) lost business caused by an illegal secondary boycott. At the trial of

this case Great Coastal presented witnesses who testified to widespread acts of violence directed towards its employees and property. Two of these witnesses were Robert Seward, who testified that when he was driving for the company in October of 1970 a brick came through his windshield and he saw men running away through the woods, and William Funai, who testified that he saw Seward's company truck with the front windshield broken and a small hole caused by a small caliber gun in the trailer. Although the violence was never adequately connected to IBT, and Great Coastal suffered a directed verdict on the damages for violence portion of the case, the Company did recover a judgment for over $800,000 for the secondary boycott.

In 1978 IBT filed an action to set aside this judgment. After a two-day evidentiary hearing, the district court found that Robert Seward had, in fact, been ordered by William Funai to take a company truck out on the road and "tear it up some." Seward then broke the windshield of the truck with a brick and fired shots into the trailer of the truck with a small caliber gun. Both Seward and Funai admitted at the hearing that their earlier testimony had been false. The district court further found that much of the other testimony from the earlier trial concerning violence had been perjured.

The majority of the Court of Appeals adopted a very narrow reading of "fraud on the court" and held that such fraud "is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney. . . ." 675 F.2d at 1356. Thus, the majority could not say "that the fraud in this case presents a deliberate scheme to

directly subvert the judicial process sufficient to constitute fraud on the court." *Id.*

The dissenting judge was simply unable to see any reasoned distinction between the case before him and *Hazel-Atlas*. The judge rejected the notion that "fraud on the court" requires wrongdoing by an attorney or other officer of the court. Instead, he identified two elements necessary to constitute "fraud on the court"; (1) that the matter be of some public importance; and (2) that the case involve "a deliberately planned and carefully executed scheme to defraud" the court. 675 F.2d at 1364.

The dissenting judge certainly had a strong point. It is simply impossible to draw a distinction that is less the arbitrary between manufacturing evidence by means of a bogus technical article (*Hazel-Atlas*) and manufacturing evidence by damaging a truck (*Great Coastal*). *See also, Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir. 1988) (attempting to distinguish *Hazel-Atlas* from other cases of manufacturing evidence on the ground that the concept of "fraud on the court" is broader in patent cases.)

The numerous other lower court opinions on the subject are equally unsatisfactory for ascertaining any workable test that distinguishes "ordinary" fraud from "fraud on the court." For example, most courts state that run-of-the-mill perjury is mere ordinary fraud. *See, e.g. Serzysko v. Chase Manhattan Bank,* 461 F.2d 699, 702 (2d Cir.), *cert. denied,* 409 U.S. 883 (1972); *H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.,* 536 F.2d 1115, 1118 (6th Cir. 1976); *Travelers Indemnity Co. v. Gore,* 761 F.2d 1549, 1551 (11th Cir. 1985);

Olson v. Arctic Enterprises, Inc., 21 F.R. Serv. 2d 423 (Dist. N.D. 1976). *But see Davsuel v. Davsuel*, 195 F.2d 774 (D.C. Cir. 1952). However, some of the courts state that, at some point perjury can be sufficiently aggravated to constitute "fraud on the court." Perhaps, the most common suggested aggravating element is involvement by an attorney. *See Kupferman v. Consolidated Research & Mfg. Co., supra* at 1078; *Travelers Indemnity Co. v. Gore, supra* at 1552. Another court has held that mere circumstantial evidence indicating that an attorney should have known that certain testimony was perjured is insufficient to show "fraud on the court." *Cleveland Demolition Co., Inc. v. Azcon Scrap Corp.*, 827 F.2d 984 (4th Cir. 1987). Yet another court would apparently hold that any sort of deliberate subornation is sufficient to elevate ordinary perjury to "fraud on the court." *Jungerson v. Axel Bros., Inc.*, 121 F.Supp. 712, 715 (S.D.N.Y.), *aff'd*, 217 F.2d 646 (2d Cir. 1954).

The law is also in a state of confusion regarding the extent to which suppression or manufacturing of evidence can constitute "fraud on the court." For example, in *Hawkins v. Lindsley*, 327 F.2d 356, 359 (2d Cir. 1964) the court indicated a showing "that officers of the court attempted to secure action of the court on the basis of a document known by them to be false" would be sufficient to constitute "fraud on the court." Another court has stated in a silghtly different context that systematic destruction of tapes and documents constitutes "fraud on the court." *Synanon Church v. United States*, 579 F. Supp. 967 (D.C. Dist. 1984). Neither of these cases can be easily reconciled with *Great Coastal Express, Inc. v. International Brotherhood, supra,* which held that intentional manufacturing of physical evidence by vandalizing a truck does not constitute fraud on the court.

The allegations in the district court in this case (which have been substantiated by documentary evidence, but have not yet been the subject of a trial) present a strong case for relief. This is not a case of a single witness perjuring himself in a single trial. Instead, the evidence indicated concerted action by numerous litigants and their attorneys in this and hundreds of other lawsuits to suppress documents and misrepresent the facts. A few examples of this will suffice. Armstrong World Industries represented in the *Wilson* case and in numerous other cases that it had only manufactured two products containing asbestos, a cork covering made from 1956 to 1959 and a spray made from 1966 to 1968. (Px-S-15). The truth turns out to be that Armstrong has been involved with the manufacture of insulation containing asbestos since at least 1910! (Px-K). This information was of central importance considering that the entire *Wilson* trial centered on when these defendants knew or should have known of dangers associated with asbestos. If a single litigant had done this in a single lawsuit, it would not amount to "fraud on the court." However, a second litigant, Celotex Corporation has done practically the same thing. Celotex has represented in hundreds of lawsuits that it was first involved with asbestos in 1972. (Px-E). The truth turns out to be that it has been involved in the asbestos industry since at least 1947. (*Id.*).

This Court should grant the writ of certiorari in order to provide further guidance on the difficult question of what constitutes "fraud on the court" and what distinguishes "fraud on the court" from "ordinary" fraud for purposes of Rule 60(b).

ISSUE 2:

Should a proceeding alleging "fraud on the court be treated procedurally as an "independent action" rather than as a mere motion for purposes of judgment on the pleadings, summary judgment, etc.?

A second exceedingly difficult question is how an action to reopen a judgment for "fraud on the court" should be treated procedurally. The Court of Appeals in the present case restricted its review to an "abuse of discretion" standard. The court applied this standard despite the fact that no evidence was heard and no trial occurred in the district court. If this proceeding was truly an "independent action" as Rule 60(b) states, the proper standard of review was to review the pleadings to determine whether "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). Alternatively, in light of the documentary evidence submitted to the district court, the proper standard was to review the evidence in a light most favorable to the plaintiff to determine whether there was any genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

The confusion in the lower courts over how this action should have been treated procedurally is best illustrated by *Bullock v. United States,* 763 F.2d 1115 (10th Cir. 1985) (en banc). There, plaintiffs unsuccessfully sued the United States in the 1950s for the deaths of livestock allegedly caused by radiation poisoning as a result of nuclear tests. Twenty-five years later plaintiff sued to

set aside the earlier judgment on the basis of fraud. The district court held a hearing, found that the government was guilty of suppressing vital information, highly deceptive responses to discovery, and "pressuring" witnesses to alter their testimony, and set aside the judgment.

The majority of the Court of Appeals did not specify what standard of review applied. Instead, it seemed to review the evidence *de novo,* rejected most of the district court's findings, and reversed. The dissenting Judges chastised the majority for failing to give strong deference to the district court's fact-findings under the "clearly erroneous" standard. Surely, if a proceeding to set aside a judgment is, in fact, an independent action, it should have reviewed it under the same standards as any other lawsuit. Thus, the dissenting judges were right, and the Court of Appeals in the present case erred by not applying the standard applicable to dismissals on the pleadings or summary judgments. *See also Madonna v. United States,* 878 F.2d 62 (2d Cir. 1989) (applying *Conley v. Gibson* to an independent action to set aside a judgment.)

This Court should also grant review to resolve the confusion over how an action to set aside a judgment for "fraud on the court" should be treated procedurally.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been duly served on all the parties listed earlier or their attorneys of record in accordance with Rule 28.3.

APPENDIX

APPENDIX A

Clarence J. WILSON,
Plaintiff-Appellant,

v.

JOHNS-MANVILLE SALES CORP., et al.,
Defendants,

Armstrong World Industries, Inc., et al.,
Defendants-Appellees.

United States Court of Appeals,
Fifth Circuit.

May 30, 1989.

Appeal was taken from order of the United States District Court for the Southern District of Texas, Hugh Gibson, J., denying motion for relief from judgment entered in favor of asbestos products manufacturers in products liability action. The Court of Appeals held that motion to set aside judgment in favor of six asbestos products manufacturers in products liability action was required to be filed within one year of entry of judgment, rather than within a reasonable time.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, RUBIN and DAVIS, Circuit Judges.

PER CURIAM:

This appeal involves a consolidated products liability action brought by fifty plaintiffs against nine defendants. More than two years after a judgment was entered in favor of six of the defendants, and following an affirmance of that judgment by this court, plaintiffs filed a motion under Fed. R. Civ. P. 60(b) to set aside the judgment. The district court denied the motion as time-barred. We affirm.

I.

Fifty plaintiffs brought a products liability action against nine manufacturers of products containing asbestos. The district court ordered separate trials on the issues of liability and damages. During the jury trial on general liability, the defendants made a "state of the art" defense based on *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 889, 95 S. Ct. 127, 42 L.Ed.2d 107 (1978), arguing that they did not know of the dangers of asbestos prior to the 1960's. The jury returned a take-nothing verdict against six of the defendants: Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., Fobreboard Corp., Owens-Corning Fiberglass Corp., Owens-Illinois, Inc., and Standard Insulations, Inc. The jury found that the remaining three defendants (Celotex Corporation, Pittsburg Corning Corp., and Raymark Industries, Inc.) were potentially liable for product exposure only after August 1, 1966.

The district court retained jurisdiction as to the three remaining defendants to conduct further proceedings regarding individual damages. As to the six defendants

exonerated from liability, the district court found that there was no just reason for delay and on August 27, 1985 directed the entry of final judgment as to those six defendants. This court affirmed the final judgment as to the six defendants in *Wilson v. Johns-Manville Sales Corp.*, 810 F.2d 1358 (5th Cir.), *cert. denied*, ___U.S. ___, 108 S. Ct. 97, 98 L.Ed.2d 58 (1987).

More than two years after the district court entered judgment, the plaintiffs requested this court to set aside the prior judgment under Fed. R. Civ. P. 60(b) on grounds of fraud committed by the defendants. We transferred the motion to the district court, which denied the motion as barred by the one-year time limit incorporated in Rule 60(b)(3). The district court subsequently entered an order pursuant to Fed. R. Civ. P. 54(b) certifying that the denial of the Rule 60(b) motion was a final judgment. The plaintiffs appeal from the district court's denial of the Rule 60(b) motion.

II.

Rule 60(b) provides a court may relieve a party from a *final* judgment, order, or proceeding. It does not afford relief from interim or interlocutory judgments.

> The addition of the word "final" emphasizes the character of the judgment, orders or proceedings from which Rule 60(b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

Fed. R. Civ. P. 60(b) advisory committee's note.

The August 27, 1985 judgment to which the Rule 60 (b) motion is addressed was final only as to six defendants. No judgment of any sort was entered with respect to the remaining three defendants. One of these three defendants, Raymark Industries, Inc., has advised this court that it is in bankruptcy proceedings. The jury verdict finding them potentially liable has not been completed by proceedings to set the amount of any damages. Accordingly, the plaintiffs' Rule 60(b) motion and the district court's denial of the motion must relate only to the final judgment with respect to the six defendants who were found not liable to plaintiffs. Although language does appear in plaintiffs' motion and in the district court's opinion and certificate with respect to the three remaining defendants, such language is beyond the scope of Rule 60(b). We treat it as surplusage. Our adjudication in the present appeal does not affect any of the three defendants as to which no final judgment was entered.

[1] A district court's denial of a Rule 60(b) motion will be reversed only for abuse of discretion. *Schauss v. Metals Depository Corp.*, 757 F.2d 649 (5th Cir. 1985). We find no abuse of discretion here.

In their Rule 60(b) motion, plaintiffs alleged that they were entitled to relief from the August 27, 1985 judgment because the defendants fraudulently concealed and misrepresented the fact that they knew of the hazards of asbestos as far back as the 1930's. The district court properly noted that the plaintiffs' motion must come under the auspices of either Fed. R. Civ. P. 60(b)(3) or 60(b)(6). Fed. R. Civ. P. 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal repre-

> sentative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to . . . set aside a judgment for fraud upon the court.

Under Rule 60(b)(3), plaintiffs' motion is subject to the one-year time limit incorporated in the rule. The time runs from the date the district court entered final judgment. *Gulf Coast Building & Supply Co. v. Int'l. Bhd. of Electrical Workers, Local 480, AFL-CIO,* 460 F.2d 105, 108 (5th Cir. 1972). The district court entered a final judgment as to six defendants on August 27, 1985, and the Rule 60(b) motion was not brought until more than two years later. The district court correctly concluded that the motion is time barred under Rule 60(b)(3).

The plaintiffs attempt to bring their motion under the residual clause of 60(b)(6). Plaintiffs cite *Liljeberg v. Health Services Acquisition Corp.*, ____U.S.____, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988) for the proposition that a Rule 60(b)(6) motion is timely if made "within a reasonable time." *Id.* 108 S. Ct. at 2204. However, the Supreme Court's complete statement reads that a Rule 60(b)(6) motion may be granted "provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Id.* We have held that "Relief under subsection (6) is not available to a movant

where . . . the relief sought would have been, if not for the Rule's time limits, within the coverage of another of the subsections of the Rule." *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 836 n. 8 (5th Cir. 1980). *See also, William Skillings & Associates v. Cunard Transp. Ltd.*, 594 F.2d 1078 (5th Cir. 1979). The district court correctly found that the plaintiffs' motion came within the coverage of Rule 60(b)(3), and thus relief under Rule 60(b)(6) is unavailable to plaintiffs.

Plaintiffs attempt to characterize the defendants' conduct as an "attack upon the judicial machinery" amounting to a fraud on the court. "Fraud upon the court" is grounds for relief under the savings clause of Rule 60(b) and is distinguishable from the "fraud . . . misrepresentation, or other misconduct" under subsection (b)(3). *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978). However, 60(b) relief based on "fraud upon the court" is reserved for only the most egregious misconduct, and requires a showing of "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *Id.* at 1338 (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)). The narrow concept should "embrace only the species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Kerwit Medical Products*, 616 F.2d at 837 (quoting 7 Moore, Federal Practice ¶ 60.33 at 511 (1971 ed.)). Less egregious misconduct comes within the scope of Rule 60(b)(3). *Id.; Rozier v. Ford Motor Co.*, 573 F.2d at 1332.

The district court construed the plaintiffs' allegations as follows:

> In short, movants object to the defendants' "state of the art" defense because of the existence of various studies and reports allegedly reporting the dangers of asbestos as far back as the 1930's and because of the contrary position taken by some defendants in other lawsuits that the dangers of asbestos were known prior to the mid-1960s.

Plaintiffs did not object to this construction in the district court, but instead immediately filed their notice of appeal.

Such allegations do not rise to the level of "fraud on the court" necessary to obtain relief under the savings clause of Rule 60(b). "[T]he mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to 'fraud upon the court' for purposes of vacating a judgment under Rule 60(b)." *Kermit Medical Products,* 616 F.2d at 837. The district court correctly found that plaintiffs' motion came under Rule 60(b)(3). As such, the plaintiffs' motion is time barred.

[2] Plaintiffs also assert that the district court should have held a hearing regarding the Rule 60(b) motion. However, a decision to hear oral testimony on motions is within the sound discretion of the district court. *Gary W. v. Louisiana,* 601 F.2d 240, 244 (5th Cir. 1979). Here the district court liberally allowed the plaintiffs to supplement their Rule 60(b) motion to the extent that the plaintiffs' total pleadings before the court consisted of the following: the original application with appendix and 34 exhibits, a reply of plaintiffs with 51 exhibits, and a supplemental reply with 41 exhibits. Considering

the extensive pleadings and the failure of the plaintiffs to adequately indicate how a hearing would have aided the court's determination, we find that the district court did not abuse its discretion in not holding a hearing. *See Scutieri v. Paige*, 808 F.2d 785, 795 (11th Cir. 1987).

III.

The district court did not abuse its discretion in denying the plaintiffs' Rule 60(b) motion. We pretermit any ruling on the effect, if any, this decision may have on future proceedings involving the three remaining defendants. The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2798

CLARENCE J. WILSON,
Plaintiff-Appellant,

v.

JOHNS-MANVILLE SALES CORP., ET AL.,
Defendants,

ARMSTRONG WORLD INDUSTRIES, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(July 11, 1989)

Before CLARK, Chief Judge, RUBIN and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

C.A. G-81-168

CLARENCE J. WILSON, ET AL

v.

JOHNS-MANVILLE SALES CORPORATION, ET AL

(Filed August 9, 1988)

ORDER

In *Borel v. Fibreboard Paper Products Corporation, et al,* the Fifth Circuit established the rights of plaintiffs to recover for asbestos related diseases. 493 F.2d 1076, 1102. Sometime after September 10, 1973, the date of the *Borel* decision, movants state that insurance companies, their insured manufacturers and various medical experts created the "state of the art" defense. This defense, according to movants, is outright fraud.

The basis of the fraud, and thus movants' 60(b) motion, is that the asbestos manufacturers and their insurance companies knew of the hazards of asbestos as far back as the 1930's. Therefore, anytime a fact finder, as in the case *sub judice,* finds that manufacturers did not know of the hazards of asbestos until after the 1930's, the manufacturers and the insurance companies have engaged in fraudulent concealment of their knowledge. Movants support this proposition with various

studies and reports that have existed in the United States since the 1930's allegedly warning of the dangers of asbestos.[1] Movants believe that the insurance companies, manufacturers and their experts should not have been allowed to assert lack of knowledge of asbestos related dangers before the mid 1960's in light of the previous-mentioned studies and reports.

Beyond the studies and reports concerning asbestos, movants rely on the case of *Pittsburgh Corning Corporation v. The Travelers Indemnity Company,* G-84-3985 (E.D. Penn. 1984), in which Pittsburgh Corning sued Travelers for alleged failure to honor policies presumed to cover asbestos related injuries. During the course of the litigation, a prior works manager (Carl Olm) at Pittsburgh Corning's facility at Port Allegany, Pittsburgh testified that he witnessed the shredding of Pittsburgh Corning asbestos related documents in either 1971 or 1972. Movants further rely on the case of *Fibreboard Corporation v. The United States,* No. 514-84 C (Cl. Ct. 1984), in which Fibreboard alleged that the United States Government impliedly agreed to reimburse and indemnify Fibreboard for asbestos related injuries. Part of the basis of Fibreboard's argument was that the U. S. Government knew of the dangers of asbestos as far back as 1934. Fibreboard cited various studies including the U. S. Public Health Services Report of 1935 purporting

1. A sample of these reports includes the following: A 1932 U.S. Bureau of Mines report to Eagle Picher concerning a limited inspection of their rock wool plant in Joplin, Missouri, a 1936 National Safety Council Report entitled "The Lesser Known Facts About Common Occupational Diseases" by Dr. Robert B. Hunt and a 1939 Surgeon General's report entitled "Statistics of Diseases and Injuries In the United States Navy." Movants assert that some of these reports were actively concealed by the asbestos manufacturers but present them as evidence in support of their 60(b) motion.

to support Fibreboard's position that the Government, by way of these studies and report, must have known of the dangers of asbestosis in the 1930's. Fibreboard and the remaining defendants in the current case asserted that they did not and could not have known of the dangers of asbestos prior to the mid 1960's. Movants find the above actions by Pittsburgh Corning, Fibreboard, and the other defendants fraudulent and, therefore, rich soil for their Rule 60(b) motion.

In short, movants object to the defendants' "state of the art" defense because of the existence of various studies and reports allegedly reporting the dangers of asbestos as far back as the 1930's and because of the contrary position taken by some defendants in other lawsuits that the dangers of asbestos were known prior to the mid 1960's.

Movants' Rule 60(b) motion, based on alleged fraud and misrepresentation,, must come under the auspices of either Rule 60(b)(3) or Rule 60(b)(6). As to Rule 60(b)(3), movants' motion fails to meet the one year time requirement[2] and, therefore, must be denied when considered under Rule 60(b)(3). Under movants' alternative, Rule 60(b)(6), the "residual clause," a movant may not use this clause where relief sought would have been, if not for the time limits, within the coverage of another of the Rule's subsections, here 60(b)(3). *Kerwitt Medical Products v. N & H Instruments,* 616 F.2d 833, 836 n.8 (5th Cir. 1980). Thus, movants' motion also fails under 60(b)(6). Even if the Court were to consider

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2. The one year time limit runs from the date the district court enters judgment. *Gulf Coast Bldg. & Supply Co. v. International Brotherhood of Electrical Workers, Local 480,* 460 F.2d 105, 108 (5th Cir. 1972)

movants' grounds of fraud and misrepresentation under Rule 60(b)(6), movants fail to meet the stringent requirements of Rule 60(b)(6). *Bros. Inc. v. W. E. Grace Mfg. Co.*, 320 F.2d 594, 609 (5th Cir. 1963). The "state of the art" defense profferred by defendants may be unpalatable to movants but in no way rises to the level of fraud or misrepresentation contemplated by Rule 60(b). *See generally* Wright and Miller, *Federal Practice and Procedure*, §§ 2860-61 and § 2864. For the above reasons, movants' motion is DENIED.

DONE at Galveston, Texas, this the 9th day of August, 1988.

/s/ HUGH GIBSON
United States District Judge